

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

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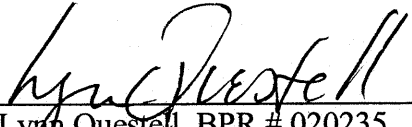
IN RE:


**SHOW CAUSE PROCEEDING
AGAINST TALK.COM, INC.**

OFFICE OF THE
EXECUTIVE SECRETARY

**DOCKET NO.
01-00216**

**BRIEF IN OPPOSITION TO DEPOSING THE CONSUMERS INCLUDED IN
THE SHOW CAUSE ORDER**


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ISSUE PRESENTED FOR REVIEW

I. Whether it is inappropriate to require the consumers whose complaints form the basis for the *Order Requiring Talk.com to Appear and Show Cause Why Cease and Desist Order and/or Fine Should Not Be Imposed* issued on November 8, 2001 to be deposited by Talk.com.

INTRODUCTION AND DESIGNATIONS

This Brief is submitted on behalf of the Consumer Services Division (“CSD”) of the Tennessee Regulatory Authority (“Authority” or “TRA”) as directed by the Pre-Hearing Officer in this docket. In addition to the aforementioned designations, Talk.com, Inc., which is affiliated with or also known as Access One, Access One Communications, The Phone Company, The Other Phone Company, AOL Long Distance, Tel-save, Talk America Holdings, Inc., and TalkAmerica®, will be referred to as “Talk.com.”

ARGUMENT

I. THE TENNESSEE CONSUMERS WHOSE COMPLAINTS FORM THE BASIS FOR THE *ORDER REQUIRING TALK.COM TO APPEAR AND SHOW CAUSE WHY A CEASE AND DESIST ORDER AND/OR FINE SHOULD NOT BE IMPOSED* SHOULD NOT BE REQUIRED TO UNDERGO DEPOSITIONS

a. Requiring Each of the One Hundred and Five Complainants to Undergo Depositions is Unnecessary and Will Delay These Proceedings

Talk.com has indicated that it intends to depose each and every one of the one hundred and five individuals who have filed the complaints that are the basis for this proceeding. Talk.com has also indicated that it believes this process will take months and will not be completed until well into the summer. The CSD in no way contests Talk.com's right to conduct discovery, but requiring the consumers whose complaints provide the basis for these proceedings to undergo the inconvenience and annoyance associated with being deposed is unnecessary. The discovery Talk.com seeks is already obtainable by a less burdensome means.¹ Talk.com is free to contact the complainants and question them without the inconvenience, expense and delay arising from depositions.

The object of discovery is to prevent parties from "trial by ambush."² That possibility has been foreclosed in this case. The CSD has already provided Talk.com with all of the complaints included in the *Order Requiring Talk.com to Appear and Show Cause Why A Cease and Desist Order and/or Fine Should Not Be Imposed* (hereinafter "*Order*"). In addition, the CSD opened its files to Talk.com during the investigation of

¹ See *Conger v. Gowder*, No. E2000-01584-COA-R3-CV, 2001 WL 301155 at *5 (Tenn. Ct. App. Mar. 29, 2001) (no Tenn. R. App. P. 11 application filed) (when ruling on discovery requests, "a trial court should consider whether less burdensome means for acquiring the requested information are available.") (not an administrative case).

this case and allowed copies to be made of their contents. In its responses to Talk.com's discovery requests, the CSD will provide Talk.com additional access to all relevant, unprivileged information related to this case. Further, in most of the counts, the information relevant to the *Order* that the complainants can provide to Talk.com is limited to information Talk.com already has: whether the complainants believe that they authorized Talk.com to switch their service and whether the complainants believe the billing they received from Talk.com was correct.

Although this proceeding will be conducted primarily under administrative regulations and, to a lesser degree, civil procedural rules, the case is truly "quasi-criminal" in nature. For example, the CSD's efforts are aimed at fulfilling its duty to enforce the law³, not at obtaining "damages" for a claimant or "making a client whole." Further, the complainants in this case are more akin to victims in a criminal case than they are to civil claimants and are not personally represented by the CSD. In Tennessee criminal prosecutions, depositions are permitted only under "exceptional circumstances," a policy which conserves limited public resources.⁴ As in criminal prosecutions, depositions, are the exception rather than the rule in actions before the TRA.

Counsel for Talk.com may urge the Pre-Hearing Officer to strictly construe Tenn. R. Civ. P. 26 and 27 in support of Talk.com's request to depose the complainants.

² *Id.*

³ See Tenn. Code Ann. § 65-1-213 (stating that "[I]t is the duty of the Tennessee Regulatory Authority to ensure that the provisions of Acts 1995, Ch. 305 and all laws of this state over which they have jurisdiction are enforced and obeyed, that all violations thereof are promptly prosecuted, and all penalties due the state are collected").

⁴ Tenn. R. Crim. Proc. 15(a) (in addition, when depositions are allowed in such prosecutions, their purpose is limited to "use at trial"); see *United States v. Ricketson*, 498 F.3d 367 (7th Cir. 1974) *cert. denied*, 419 U.S. 965 (1974) (applying federal equivalent of Rule 15, 18 U.S.C. § 3503, to deposition of a victim who was too ill to attend trial).

Tennessee administrative authority does not support such an approach. Tenn. Comp. R. & Reg. 1220-1-2-.11 reflects a preference for informality in the discovery process to “avoid undue expense and delay.”⁵ Thus, proceedings before this agency generally are not subject to the full compliment of discovery requirements contained in the Rules of Civil Procedure. Tenn. Comp. R. & Reg. 1220-1-2-.11(1) mandates that only if “informal discovery is not practicable” shall discovery be sought and effectuated under the Tennessee Rules of Civil Procedure.⁶ Here, the issues are not complex and informal discovery is clearly practicable. The CSD requests that the Pre-Hearing Officer exercise his discretion on the side of consistency with the preference for informality embodied in the Regulations and avoid the undue expense and delay of formal depositions of the complainants.⁷

b. Requiring Complainants to Undergo Depositions Will Have A Chilling Effect on the CSD’s Ability to Enforce Tenn. Code Ann. § 65-4-125 in Violation of Public Policy

The consumer protection laws enforced by the CSD reflect a public policy that encourages consumers to report incidences of corporate activity deemed by the General Assembly to be undesirable. The legislature and the TRA have enacted concomitant laws and regulations designed to make the process of filing complaints in this agency convenient and user-friendly. Forcing complainants to expend the resources involved in being deposed contravenes the public policy underlying the legislation the CSD is bound

⁵ Tenn. Comp. R. & Reg. 1220-1-2-.11(1). Allowing depositions will create a logistical nightmare. The individuals whose complaints provide the basis for this proceeding reside throughout the State. Either they or the State, represented by counsel for the Consumer Services Division, will face unnecessary expense and inconvenience if required to attend such depositions.

⁶ *Id.*

⁷ See *Department of Commerce & Ins. v. Firsttrust Money Services, Inc.*, 931 S.W.2d 226, 230 (Tenn.App.1996); *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn.1985) (The scope of discovery is within the sound discretion of the agency).

to enforce.

The complainants in this case have exercised the initiative to file complaints with the CSD and taken the time from their busy schedules to talk to our investigators. By their efforts, these complainants have fulfilled the intent of the legislature, enlisting in the fight against undesirable telecommunications-related activity. Instead of garnering appreciation for their civic efforts, they will be subjected to the expensive, time-consuming and possibly intimidating legal process that formal depositions entail should Talk.com's proposal be accepted.

Of particular concern is the expense the complainants will face arising from their absence from work if Talk.com's request is granted. The complainants in this case are working citizens. Many allege that they have already suffered serious financial hardship arising from Talk.com's business practices and that they spent hours trying to get their problems with Talk.com resolved. Talk.com seeks to require these individuals to expend additional time and resources on the problems Talk.com allegedly caused. Taking one or more days off from work or hiring an attorney could impose a financial burden upon them sufficient to make them regret their involvement in this process.

The complainants in this case contacted the CSD seeking assistance in the resolution of their individual complaints, not with the expectation of lengthy involvement in time-consuming depositions and administrative proceedings. Ordinarily, slamming and cramming cases are resolved through mediation, as required under the Regulations, and the matter is then closed.⁸ Show cause proceedings such as this are required, however, when a telecommunications company has generated a sufficient number of complaints to demonstrate that it has "followed a pattern of continued violation of Tenn.

Code Ann. § 65-4-125(a)” and (b) or the relevant Regulations.⁹ Upon receipt of complaints sufficient to establish a pattern of violation, “the Authority shall issue a show cause order with respect to such acts pursuant to Tenn. Code Ann. § 65-2-106.”¹⁰ A single glance at the number of complaints included in the *Order* demonstrates why the CSD was duty bound to commence this action. The complainants in this case have already expended more time and effort in their cases than many other consumers who contact the CSD and should not be asked to make the additional sacrifice of their resources that depositions will require when Talk.com’s own alleged business practices and the massive number of complaints they have generated are the sole reason for this proceeding. If participation in show cause proceedings is permitted to become expensive and burdensome, Tennessee consumers will be discouraged from filing complaints against corporations that are violating the law, a result counter to the legislature’s intent when it enacted Tenn. Code Ann. § 65-4-125. Imposing such a burden is likely to have a chilling effect on the decision of other victims of slamming, cramming and Do-Not-Call violations to come forward in the future.

c. Requiring Depositions of the Complainants Creates the Potential for Conflict of Interest

Requiring counsel for the CSD to attend depositions of the complainants in this case creates an awkward situation which gives rise to the potential for conflict of interest or the appearance of a conflict of interest. It must be assumed that some of the complainants who would be deposed if Talk.com’s request for depositions is granted will

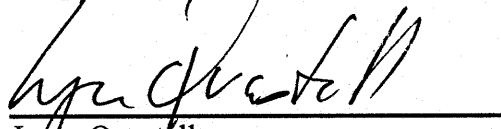
⁸ Tenn. Comp. R. & Reg. 1220-4-2--56(10) and 1220-4-2--58(6).

⁹ Tenn. Comp. R. & Reg. 1220-4-2--56(10)(c) and 1220-4-2--58(6)(c).

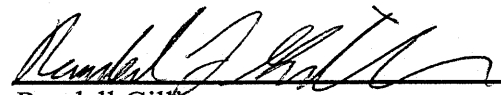
¹⁰ *Id.*

be unable or unwilling to retain counsel to represent them in this proceeding. If Talk.com's request for depositions is granted, it is incumbent upon counsel for the CSD to attend each of these depositions. As in criminal prosecutions, CSD's counsel represents the state, not the victims or complainants. Nevertheless, during the course of these proceedings the unrepresented complainants will look to the CSD for direction as to the procedural intricacies related to this proceeding. Counsel for the CSD should not be placed in a position where the complainants might seek or require legal advice during the depositions, particularly when counsel's refusal to commit an ethical violation could have negative consequences on the prosecution of this case.

Respectfully submitted,



Lynn Questell
Counsel



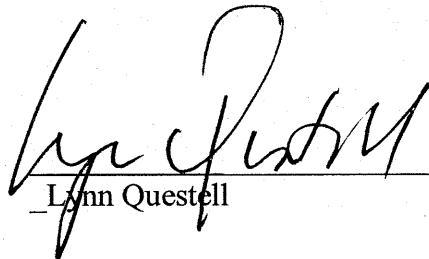
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CERTIFICATE OF SERVICE

I, Lynn Questell, hereby certify that I have served a copy of the foregoing Brief in Opposition to Deposing the Consumers Included in the Show Cause Order of the Consumer Services Division of the Tennessee Regulatory Authority on the following person by hand delivery or by depositing a copy of the same in the United States Mail, postage prepaid, addressed to them at the addresses shown below, this 13th day of January, 2002:

Henry Walker
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